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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

DOCKET FILE COPY ORIGINAL

Petition of the State Independent Alliance
and the Independent Telecommunications
Group for a Declaratory Ruling That the
Basic Universal Service Offering Provided
by Western Wireless in Kansas is Subject
to Regulation as Local Exchange Service

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WT Doc. No. 00-239

PETITION FOR RECONSIDERATION AND CLARIFICATION

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TABLE OF CONTENTS

SUMMARY	iii
I. BUS IS NOT A MOBILE SERVICE	2
A. The Order's Conclusion that BUS is a Mobile Service Is Not a Decision of the Commission Because It Was Not Supported by a Majority of the Commissioners Participating.	2
B. The Conclusion That BUS Is CMRS Because it Employs a "Mobile Station" Is, in Any Event, Erroneous.	3
1. The Statutory Term "Ordinarily" must Be Given its Ordinary Meaning. .	3
2. There Is No Basis in the Record for Finding That the BUS Terminal "Ordinarily Does Move"	5
II. THE ANCILLARY, AUXILIARY AND INCIDENTAL CLASSIFICATION IN THE COMMISSION'S RULES CANNOT ELIMINATE THE STATUTORY REQUIREMENT THAT A MOBILE STATION "ORDINARILY MOVE"	8
A. The Auxiliary, Ancillary, and Incidental Classifications Were Developed to Permit Some Non-mobile Use of Frequencies Otherwise Restricted to Mobile. .	8
B. The Commission's Discretion to Allow Both Fixed and Mobile Uses on the Same Frequency Cannot Be Bootstrapped into the Supposed Power to Ignore a Statutory Definition in Order to Expand the Preemption of State Commissions.	10
III. THE COMMISSION SHOULD CLARIFY THE ORDER'S IMPLICATIONS FOR THE RIGHT OF STATE COMMISSIONS TO PROVIDE UNIVERSAL SERVICE SUPPORT TO SERVICES NOT ENCOMPASSED IN THE FEDERAL LIST OF SUPPORTED SERVICES.	11
A. The Order Is Not Clear as to Whether Supported Service in a Voluntary State Universal Service Plan Is Equivalent to a Requirement That the Service Be Provided.	11
B. A Condition of Receiving Support in a Voluntary Program is Not a Requirement Within the Meaning of Section 332.	12
C. The Commission Should Encourage State Development of Additional Support Plans	13
IV. CONCLUSION	14

SUMMARY

The Independents request reconsideration and clarification of certain aspects of the Memorandum Opinion and Order adopted August 2, 2002, in response to their Petition for Declaratory Ruling that the BUS offering of Western Wireless is not a Commercial Mobile Radio Service. The Petition asserted that BUS is not CMRS because the subscriber premises equipment utilized in the service does not “ordinarily move” and therefore the service does not come within the statutory definition of a mobile service. The Independents seek reconsideration because the effect of the Order appears to be that Kansas is precluded from establishing a state program which provides in-state funded universal service support for services deemed important by the Kansas legislature or Corporation Commission.

The Order concludes, at least so far as two Commissioners agree, that the service is a CMRS service on the grounds that the “ordinarily moves” test is satisfied by BUS because mobile operation is “reasonably likely and not an extraordinary or aberrational use of the equipment.” Alternatively, the Order states that the BUS service is subject to regulation as CMRS because it is incidental to Western Wireless’ cellular mobile service. The Order concludes that because BUS is a CMRS offering, Kansas may not regulate BUS entry or rates and may not require equal access for telephone toll services, and that the offering is not subject to federal regulation as a LEC.

The Independents ask first that the Commission clarify that the Order’s conclusion that BUS meets the statutory definition of mobile service is not “by the Commission” because two of the four participating Commissioners did not support that conclusion. The Independents also ask for reconsideration of the conclusion regarding mobility because the Order fails to justify

departure from the ordinary meaning of the term “ordinarily.” Further, the Order finds no basis in the record to find that the large, heavy and awkward Telular unit used to provide BUS “ordinarily moves” within the meaning of the Act.

The Independents also ask reconsideration of the Order’s conclusion that even if BUS is a fixed service, it is incidental to Western Wireless’ cellular service and therefore subject to regulation as CMRS under the Commission’s rules and precedents concerning ancillary, auxiliary and incidental services. The Independents question whether a “universal service” with ETC status can be incidental, whether the rules or Commission decisions actually establish such status, and, most significantly, whether the Commission can by rules, define a service as preempted from state regulation in a manner inconsistent with the governing statute.

Assuming, *arguendo*, that BUS is CMRS, the Independents seek clarification of the Order’s description of the consequences of that classification. The Order states that Kansas may not, at least in the absence of additional showings, regulate the rates or entry of BUS or require that it provide equal access. That conclusion essentially restates section 332 of the Act as applied to any CMRS service. The Order does not, however, clearly answer the question as to whether Kansas may decide to establish a fund, supported only from intra-state sources, that provides support for carriers which choose to provide services not included in the list of federally supported services, including equal access and advanced services. The Order does not address how a condition imposed on receipt of support in a voluntary program can be found to be the legal equivalent of a requirement to provide a service. The Independents contend that Congress intended to encourage, not preempt, precisely such state-supported funds by enacting Section 254 (f).

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PETITION FOR RECONSIDERATION AND CLARIFICATION

The State Independent Alliance and the Independent Telecommunications Group ("Independents"), pursuant to Section 1.106 of the Commission's Rules, respectfully request that the Commission reconsider and clarify the Memorandum Opinion and Order in this proceeding, released August 2, 2002, FCC 02-164 ("Order"). The Order was issued in response to the Independents' Petition for a Declaratory Ruling that the Basic Universal Service ("BUS") offering of Western Wireless Corporation is not a Commercial Mobile Radio Service ("CMRS") for the purposes determining preemption of conditions established by the State of Kansas for eligibility for participation in the Kansas Universal Service Fund ("KUSF"). The Order's stated conclusion is that BUS is "a CMRS offering" and that therefore the Kansas Corporation Commission ("KCC") may not regulate its rates or entry and may not require equal access. Reconsideration and Clarification of the Order is required for the reasons listed below.

I. BUS IS NOT A MOBILE SERVICE

- A. The Order's Conclusion that BUS is a Mobile Service Is Not a Decision of the Commission Because It Was Not Supported by a Majority of the Commissioners Participating.

The Order states "we conclude based on all the facts before us that Western Wireless' BUS offering is a mobile service and thus CMRS."¹ The Order also concluded that "even if BUS were not considered to meet the statutory definition of "mobile" it is still properly classified as CMRS because it is ancillary, auxiliary or incidental to Western Wireless' provision of traditional mobile cellular service."² The Order states that it is "By the Commission" with Commissioner Abernathy concurring and Commissioner Martin dissenting. Commissioner Martin dissented from both conclusions of the Order. Commissioner Abernathy's concurring statement is clear that she agrees with the decision that BUS should be regulated as CMRS because the service is ancillary, auxiliary, or incidental to mobile service. She clearly does not agree with the conclusion stated in the Order that the term "ordinarily" in the Act should not be given its ordinary meaning, and believes that "consumers will not ordinarily use the [terminal equipment] in a mobile fashion."³ The absence of a majority in support of one of the two alternative holdings in the Order requires that the Commission revise the Order to delete the conclusion that Western Wireless' terminal equipment "ordinarily moves" or at least clarify that the finding that BUS is a mobile service is not "By the Commission."

¹ Order at para. 17.

² Order at para. 26.

³ Concurring Statement of Commissioner Kathleen Q. Abernathy ("Abernathy statement").

B. The Conclusion That BUS Is CMRS Because it Employs a "Mobile Station" Is, in Any Event, Erroneous.

1. The Statutory Term "Ordinarily" must Be Given its Ordinary Meaning.

The Act is clear that services that can be classified as mobile are only those which involve a "mobile station" and that a mobile station must be one which "ordinarily does move."⁴ It is standard statutory construction that in the absence of Congressional indication to the contrary, words in a statute are given their ordinary meaning. Webster's applicable definitions of the adjective "ordinary" include "(1) of the usual kind, not exceptional, commonplace; (3) customary, normal; (6) the commonplace or average condition; (7) something regular, customary or usual."⁵ These definitions are consistent with Commissioner Abernathy's view that the statute intends for the Commission to focus on the "intended or typical use." The Order, however, states that it is not necessary for a radio station to "usually or typically" move in order for it to be found "ordinarily" to move, but instead finds that the requirement that a mobile station "ordinarily does move" is met if mobile operation is "reasonably likely and not an extraordinary or aberrational use of the equipment."⁶

The Order cites no Congressional authority or intent for use of a definition inconsistent the plain meaning of the word, but claims that its conclusion is supported by Commission rules and precedent, such as section 22.99 of the rules that define a mobile station used in the cellular

⁴ 47 U.S.C. 153 (28)

⁵ Webster's Encyclopedic Unabridged Dictionary, Gramercy Books, 1989, p.1013 ("Webster's").

⁶ Order at para. 20.

service as "capable of operation while in motion." It is axiomatic, however, that the Commission cannot eliminate a statutory requirement simply by passing a rule which fails to incorporate that requirement.⁷

The statement that "none of these rules or precedents suggest a definition of mobility that depends on how most customers actually use a piece of equipment or service," at best demonstrates that none were adopted in the context of determining if the equipment "ordinarily" moved in order to decide whether state regulation was preempted by Section 332. There is no showing that Congress was ever aware that the Commission's practice was to write the "ordinarily does move" requirement out of the Act or that it acquiesced in an intentional disregard of a statutory provision.

The Order violates the plain meaning of the statute by concluding that a station "ordinarily does move" if mobility is an inherent part of the service and it is reasonably likely and not an extraordinary or aberrational use of the equipment. To say that mobility must be an inherent part of the service is to say no more than that the station is capable of moving. To say that mobility is not extraordinary or aberrational is to say no more than mobility is the ordinary use. Not extraordinary means ordinary; not aberrational means not "deviating from ordinary, normal or usual."⁸

⁷ This point is discussed further in Part II, below, which argues that the Commission's authority to classify a fixed service as ancillary, auxiliary or incidental to a mobile service in order to allow the fixed service to use frequencies otherwise reserved for mobile use does not provide authority to eliminate a statutory characteristic of service in order to determine whether state regulation is preempted.

⁸ Webster's, p.3.

The unsupported claim that classifying a service based upon how individual users choose to use the service is not workable from a regulatory standpoint, and could cause regulatory status to shift also provides no basis for the Commission to ignore the plain meaning of the statute. As discussed more fully below, the record in this proceeding, and the Commission's knowledge of the services of the industry, provide an ample basis for the Commission to determine the ordinary use of the BUS terminal. Thus two Commissioners recognized that "consumers will not ordinarily use the Telular terminal in a mobile fashion" and "...this device is too large, too heavy, and too lacking in mobile usefulness for a reasonable person to find that it 'ordinarily' moves as do other wireless devices." ⁹ Nor is the potential for change in regulatory status over time an excuse to avoid the statute, which itself provides multiple provisions which contemplate change in status based upon factual showings.¹⁰

2. There Is No Basis in the Record for Finding That the BUS Terminal "Ordinarily Does Move."

The Order finds that the BUS terminal meets the second prong of the definition of a mobile station because mobility is an intended and actual use of the equipment. It reaches this conclusion based upon the capability of the equipment to provide "seamless hand-off," the assertion of WesternWireless that it demonstrates the mobility to customers, and Western

⁹ Abernathy statement; Dissenting Statement of Commissioner Kevin J. Martin ("Martin statement").

¹⁰ Section 332(c)(3)(A) expressly contemplates that the regulatory status of CMRS carriers may change as market conditions change. The definition of a local exchange carrier in section 153(26) excludes providers of commercial mobile service, unless the Commission finds they should be included.

Wireless' documentation purporting to show actual mobile use.¹¹ This conclusion is flawed however, because it wrongly equates capability with intended ordinary use, and then equates intended ordinary use with actual ordinary use.

The conclusion is thus contrary to the statute and the requirement that the Commission establish a rational basis between the facts found and the conclusions reached. The fact that the terminal equipment may have hand-off capability does not support a conclusion that that capability is "ordinarily" used any more than the fact that there are now hundreds of thousands of SUVs on the nation's highways with four-wheel drive capability demonstrate that SUVs "ordinarily" operate in four-wheel drive mode. Rather, it is well known that the *capability* is used less than 1% of the time. To a much greater extent than the additional electronic components required for "hand-off" capability in a transceiver, the four wheel drive capability of an SUV is more expensive to purchase and to operate than a vehicle without the capability, but the fact of this additional cost would not support a finding of fact that the *ordinary* use of SUVs is in four wheel drive mode.

Nor does demonstration of mobile capability to customers demonstrate ordinary use. Likewise, some mobile usage by a few consumers does not establish that the ordinary use of the

¹¹ Order at paras. 18-19. The Order (para. 17) distinguishes BUS from BETRS on the basis of its capability to be "picked up, placed in a car, rolled down the road and taken to the barn," but cites no evidence that BETRS terminals do not have the same *capability* (as opposed to whether the BETRS license permits mobility).

service is mobile, and it is illogical to so conclude when the market has made small, light-weight alternatives available which are orders of magnitude more convenient to use.¹²

The Order rejects Petitioners' argument that Western Wireless could not have intended the BUS service to ordinarily be used for mobility, because it would cannibalize their truly mobile service offerings.¹³ The fact that some truly mobile service providers also market their service as a substitute for wireline service does not disprove the cannibalization argument because the Order cites no evidence that their rate plans have price distinctions between wireline substitute and mobile services.¹⁴

Finally, whether Kansas treats BUS as if it were CMRS or some other state commissions conclude that the service is mobile is neither binding on the FCC, or probative of whether the terminal equipment ordinarily moves. The North Dakota decision cited in paragraph 25 of the order, for example, is clearly based solely on capability, the first prong of the federal definition of

¹² The Order states at para. 22 that older and bulkier equipment remains classified as mobile, but the question is not classification of equipment, but whether a service involves a station that ordinarily moves. "Bag Phones" were designed to be used in vehicles and so had no need for the heavy batteries of the Telular unit which are provided to maintain communications for a short period in the event of power failure at their *fixed* location. Bag phones were smaller and more convenient than the BUS equipment because a separate handset and associated wiring as well as dual voltage capability were not required. Bag phones are no longer marketed because much smaller, lighter and more convenient handsets are now readily available. Order, para. 22 and n. 92. Even if the Commission might speculate that consumers would have more readily carried the BUS equipment around in their car in the era of bag phones, that speculation is irrelevant in the current market. Similarly, the fact that a consumer might ordinarily carry around a lap-top sized Inmarsat-M terminal to receive satellite mobile service, those units will be quickly abandoned, and thus no longer ordinarily move, as soon as small, light handsets become available.

¹³ Order at para. 23.

¹⁴ U.S. Cellular, for example, offers several rate plans in Kansas according to its website, but all involve a monthly access and a per minute charge above a basic allowance.

a mobile station, and ignores altogether the second, and necessary prong, that the station “ordinarily does move.” The Order cites no state decision explicitly finding that the BUS service meets the second prong.

II. THE ANCILLARY, AUXILIARY AND INCIDENTAL CLASSIFICATION IN THE COMMISSION’S RULES CANNOT ELIMINATE THE STATUTORY REQUIREMENT THAT A MOBILE STATION “ORDINARILY MOVE”

A. The Auxiliary, Ancillary, and Incidental Classifications Were Developed to Permit Some Non-mobile Use of Frequencies Otherwise Restricted to Mobile.

The Independents remain of the opinion that BUS cannot be both an “incidental” service and a “universal service” for which Western Wireless has voluntarily undertaken to provide service everywhere in the area specified in its ETC designation, and to advertise the availability thereof. Designation as a second ETC encompasses the possibility that the incumbent LEC may withdraw, leaving BUS as the only carrier with these obligations. Assuming, *arguendo*, that BUS is “incidental” the Commission cannot validly use rules which were designed to allow fixed use of spectrum otherwise restricted to mobile use, as a means of avoiding a statutory definition. Nor does reliance on the “incidental” rule to preempt state universal service fund conditions appear rational when the rule ante-dates the Commission’s decision to grant co-primary status to fixed services, is therefore of no apparent utility, and is being considered for elimination.

The Order describes generally the evolution of the Commission’s treatment of the provision of fixed services in the context of regulation of mobile services.¹⁵ Prior to the 1996 amendments to the rules permitting CMRS carriers to provide fixed wireless services on co-primary basis with commercial mobile services, the Commission “permitted CMRS providers to

¹⁵ Order at paras. 2-7.

offer services that are ancillary, auxiliary or incidental to their primary mobile offerings, without change in their regulatory status.”¹⁶ The Order specifically finds that the BUS offering meets the criteria of section 22.323 of the rules and is classifiable as an incidental service. “and therefore properly regulated as CMRS.”¹⁷

Section 22.323 of the Rules, however, says only that carriers authorized to provide mobile services “may use these stations to provide other communications services incidental to the primary public mobile service for which the authorizations were issued.”¹⁸ The rule does not, therefore, itself support the statement that even if the BUS service is fixed, it “is properly regulated as CMRS” because the rule says nothing at all about how an incidental service is to be regulated.

The Order also cites to several previous Commission orders as establishing the proposition that an “incidental” service is properly regulated as CMRS. Indeed, the *Second CMRS Flex Order* does state that auxiliary, ancillary and incidental services are regulated as CMRS.¹⁹ There is no discussion supporting this conclusion, however, only a citation to the *CMRS Second Report and Order* which only discusses auxiliary and ancillary services, but

¹⁶ Order at para. 5.

¹⁷ Order at para. 28. The finding (para. 27) that BUS is an incidental service because of its current small proportion of the number of cellular subscribers leaves it subject to the kind of change in status the Order finds unacceptable.

¹⁸ 47 C.F.R. 22.323. Sections 20.7(g) does specifically provide that auxiliary services provided by mobile service licensees and ancillary fixed services provided by personal communications service providers are mobile services within the meaning of sections 3(n) and 332 of the Act. Section 20.9(a) provides that auxiliary and ancillary services shall be regulated as CMRS pursuant to section 332 of the Act.

¹⁹ 15 FCC Rcd 14680, 14684 (2000).

makes no mention of incidental services.²⁰ The *CMRS Flex Order*, cited by the Order, also states that auxiliary, ancillary and incidental services fall within the statutory definition of mobile, but also does not provide any discussion, and simply cites back to *CMRS Second Report and Order*.²¹ Thus the only source of authority claimed for the regulation of fixed incidental services as CMRS is an order that refers only to auxiliary and ancillary services, and the Order did not find that BUS met either definition.

B. The Commission's Discretion to Allow Both Fixed and Mobile Uses on the Same Frequency Cannot Be Bootstrapped into the Supposed Power to Ignore a Statutory Definition in Order to Expand the Preemption of State Commissions.

Assuming, *arguendo*, that either Commission rules or previous decisions have determined that an incidental service is a mobile service for purposes of section 332 of the Act, or that the Commission concludes that BUS is an auxiliary service, any such rule or decision which disregards the statutory requirement that a mobile service involve mobile stations which "ordinarily" move is necessarily invalid. Section 332 preempts certain regulatory actions by state commissions of *mobile* services. The Commission cannot ignore the statutory definition of such service which requires that it involve a mobile station and that station must "ordinarily" move. This conclusion does not implicate adversely either past or current rules of the Commission regarding which services may use which frequency, a subject matter generally left to the Commission's discretion. When, however, the Commission is determining which services are preempted from state commission regulation, the Commission has no more authority than that

²⁰ Implementation of Sections 3(n) and 332, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1424 (1994)

²¹ 11 FCC Rcd 8965, 8986 (1996)

given it by Congress, and that authority must be strictly construed as there is no presumption of preemption beyond that intended by Congress.

III. THE COMMISSION SHOULD CLARIFY THE ORDER'S IMPLICATIONS FOR THE RIGHT OF STATE COMMISSIONS TO PROVIDE UNIVERSAL SERVICE SUPPORT TO SERVICES NOT ENCOMPASSED IN THE FEDERAL LIST OF SUPPORTED SERVICES.

- A. The Order Is Not Clear as to Whether Supported Service in a Voluntary State Universal Service Plan Is Equivalent to a Requirement That the Service Be Provided.

Section 254(f) of the Act provides that "A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state..." so long as the federal mechanisms are not burdened. Despite this clear Congressional encouragement to states to go beyond the federal system if it provides the support from resources within the state, the implication of the Order is that a state cannot decide that it is in the best interests of its citizens that it provide support for equal access to long distance services. Although that is the implication of the Order, the use of the term "requirements" instead of "definition of supported services" leaves a reasonable doubt as to the intended effect.²² The Independents therefore request that the Commission restate its conclusion so as to leave no doubt as to whether its intent was specifically to prohibit the Kansas Legislature and the KCC from establishing equal access as a condition of receipt of KUSF support or, whether the KUSF is prohibited from establishing a program providing state universal service support to carriers who offer equal access.

²² Whether provision of support only to carriers who choose to provide equal access constitutes a "requirement" within the meaning of Act is discussed below.

B. A Condition of Receiving Support in a Voluntary Program is Not a Requirement Within the Meaning of Section 332.

If the intent of the Order was to state such a prohibition, and assuming, *arguendo*, that the BUS service is CMRS, the Order fails to explain how a condition to receipt of support in a purely voluntary program constitutes a “requirement” within the meaning of section 332(c)(8). The Independents recognize that section 332(c)(8) was among the factors considered by the Commission in its decision not to include equal access as a supported service for federal USF purposes.²³ However, like the Order, the Universal Service Order assumes, without discussion, that a condition precedent to receiving support must or can be considered a requirement, even though, unlike an incumbent local exchange carrier, a carrier that chooses to apply for second ETC designation has not only a legal, but practical option to withdraw that application and avoid the responsibilities such designation entails. Nothing in the Order address this question.

The Utah Supreme Court addressed a similar question earlier this year and concluded that the Utah Public Service Commission was not preempted from establishing a maximum price to be charged by recipients of the state universal service support fund. The Court stated that this condition on receipt of funds did not constitute rate regulation in violation of section 332 because “it does not unilaterally restrict or control the rates a commercial mobile service can charge...is not a factor in determining ETC status or in eligibility for federal universal service support. *Only if an ETC wishes to receive state universal service funds must it comply....*”²⁴

²³ Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 8819 (1997).

²⁴ *WWC Holding Co. Inc. v. Public Service Commission of Utah*, 44 P. 3d 714 (Utah 2002).

C. The Commission Should Encourage State Development of Additional Support Plans

The 1996 amendments to the Act changed the federal-state relationship in several ways, increasing state authority in some areas and decreasing it in others. On balance, however, the Act still preserves the role of state regulators to function as “laboratories” within a federal system with broad discretion to experiment with different approaches, and to account for local conditions, within an overall policy framework set by Congress. Given the Congressional policy determination that universal service should not only be preserved, but advanced, and the right of states to establish additional conditions recognized by the 5th Circuit, the Commission should encourage, rather than discourage, state experiments to provide support for services which otherwise might not be made available.

This concept is particularly important in view of the right of an incumbent to withdraw from ETC status once a second ETC is designated. In such circumstances if the second ETC does not provide the services of the original ETC, consumers will be faced with an involuntary degradation of service. The Commission undoubtedly has broad discretion to determine the characteristics of the federal USF system, but that discretion does not necessarily extend to state programs, particularly where a state determines to provide support, paid for by the consumers in the state, on the condition that the recipient offer a service which promotes competition in long distance service by offering consumers a choice of long distance carriers.

IV. CONCLUSION

Western Wireless encouraged the Commission in an earlier proceeding to lift the then current limitations on provision of fixed services over frequencies assigned to mobile service with the comment that it "is well suited to provide fixed-wireless service, including wireless local loop service." Convinced of the public benefits of expanding the offering of fixed services the Commission agreed to lift the limitations and grant them co-primary status. The Memorandum Opinion and Order in this proceeding inconsistently concludes that such services are mobile, either (according to two Commissioners) actually mobile, or (according to the majority) legally mobile, apparently rendering the co-primary decision unnecessary.

Even if Western Wireless's BUS is actually, or legally, mobile, which the Independents dispute, the Order requires clarification as to the preemptive effect of the conclusion. The Act is clear that states may not regulate entry or rates (except in some circumstances) or require the provision of equal access of CMRS. What is not clear from the Order, however, is what authority a state retains under section 254(f) to provide state funded support for services which it deems worthy, but which are not included in the list of federally supported services.

This proceeding is not about whether mobile service providers can be designated ETCs and receive universal service support. Truly mobile services are presently receiving significant amounts of support. The issue is whether the Commission, professing to embrace "competitive neutrality," should nevertheless determine that a state may not establish state-supported programs which condition support for competing carriers with functionally comparable services upon the provision of services that the state legislature believes promote competition and consumer benefits by offering a choice of long distance carriers. We submit that it should not.

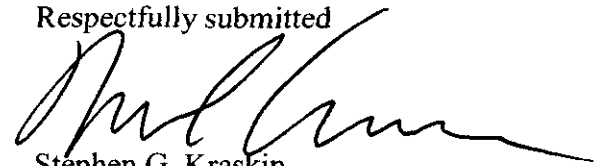
For the reasons stated above, the Independents respectfully request that the Commission reconsider and clarify its Order.

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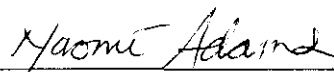
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CERTIFICATE OF SERVICE

I, Naomi Adams, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Petition for Reconsideration of the State Independent Alliance and the Independent Telecommunications Group" was served on this 3rd day of September, 2002 by first class, U.S. mail, postage prepaid or by hand delivery to the following parties:



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